proof from any persons or groups that they are not subversive elements." (28 Cal. 2d p. 548.) Specifically with reference to De Jonge, quoted *supra,* we added: "The De Jonge case cannot be distinguished on the ground that it involved a criminal statute, while the statute in the present case sought to suppress free speech and assembly by requiring an administrative board to deny permits for meetings of those whose objects and affiliations are disapproved. In each case the state sought to suppress free speech and assembly and it is immaterial that it sought to accomplish that objective in the one case by threat of punishment and in the other by censorship." (28 Cal. 2d p. 553.)

Having thus clearly held that the statute then before us was unconstitutional for denying to "subversive groups" the right to use school "civic centers" for assemblies and the exercise of the right to speak freely therein, without regard to the lawful or unlawful purpose or character of such meetings, we added: "The state must be on the alert for any clear and present danger to the community, sensitive to the warning signals, the ambiance in which a forum is planned, the atmosphere that envelops it. It cannot look with equanimity upon those whose words or actions have already left in their wake a trail of violence.

"Always it must distinguish, however, between speech, no matter how unorthodox, that remains on a theoretical plane, and speech, no matter how skillfully

intoned, that creates a clear and present danger to the community." (28 Cal. 2d pp. 553-554.)

The Legislature in enacting sections 16564 and 16565 was attempting, without doubt, to bring its regulations within the constitutionally permitted area, thus adverted to by us in Danskin, by limiting its regulation to the permissible field of prevention of speech and assembly in school buildings which would constitute "a clear and present danger to the community." It is argued by respondent that it has done so. On the other hand, petitioners point to the language of section 16564: "Any use . . . for the commission of any act intended to further any *program* or *movement the purpose of which* is to accomplish the overthrow of the Government . . . by force, violence, or other unlawful means . . ." (emphasis added); and argue that the language is so broad in its scope as to include acts which would not create the clear and present danger which permits the preventive or punitive action of the state, and would prohibit speech or other conduct "that remains on a theoretical plane" as well. We accept the argument of respondent in this particular that the quoted language, in order to avoid this constitutional objection, should be construed to reach and prohibit only such "acts" as would constitute a "clear and present danger," as that term has been construed by the United States Supreme Court. This concession, however, is of little importance when we return to the requirements of section 16565. That section as pres-

ently in force provides: ". . . the governing board *shall require* the making and delivery . . . of a written statement of information *in the following form*: . . . That ....., the organization on whose behalf he is making application . . . does not . . . advocate the overthrow of the Government . . . by force, violence, or other unlawful means, and that . . . it is not a communist-action organization or communist-front organization required by law to be registered with the Attorney General of the United States." (Emphasis added.) The emphasized words "shall require . . .in the following form" are mandatory on the school board and on the applicant. " 'Shall' is mandatory and 'may' is permissive." (Ed. Code, § 36, formerly § 19.) The section requires the applicant *to furnish the statement in this form,* without exception, and it was the refusal of the applicant to furnish the required statement that resulted in the denial of its application to use the school's "civic center." The requirement that the applicant shall deny in the required statement that the organization is one of those expressly mentioned therein bars the door, because the applicant cannot truthfully furnish the statement required, to every organization included in that portion of the quoted language. Thus if an organization does "advocate the overthrow of the Government . . . by force, violence, or other unlawful means" or is "a communist-action organization or communist-front organization required by law to be registered with the Attorney General," the governing

board, unless the applicant is willing to perjure himself, never reaches the decision required in the case of all other applicants by section 16564, since by the express terms of section 16565 the governing board "shall," i.e., "must," require the statement, which in such case cannot be truthfully made, before it can act upon the application to use the school property for the proposed meeting. The present statute thus has the same vice which caused us to strike down its predecessor section in Danskin. It closes the doors to public meetings of the proscribed organizations, while leaving them open to all others, even though the particular meeting may be for an entirely lawful purpose. It thus, somewhat more indirectly, prevents assembly and free speech in school buildings by certain organizations becauses it disapproves of the organizations and not because of what those organizations may intend to say or do therein. This is exactly the type of regulation held unconstitutional by us in Danskin and by the United States Supreme Court in De Jonge, *supra*.

Respondent suggests that a difference now exists between the facts and decisional law considered by this court in Danskin and by the United States Supreme Court in De Jonge (1) because it has since been determined by the Legislature and the Congress that the Communist Party is a continuing conspiracy to overthrow the Government of the United States and the State (Gov. Code, § 1027.5; 50 U.S.C.A. §§ 781, 841) and (2) because the scope of the clear and present

danger rule has been broadened and relaxed by later decisions of the United States Supreme Court.

Addressing ourselves to the second point, it is unnecessary again to review the development of the "clear and present danger" rule in the decisions of the United States Supreme Court up to the time that we decided Danskin, since we cited and quoted extensively from the cases in that court on this subject in the Danskin case. (28 Cal. 2d pp. 542-545.) It is argued that the rule as theretofore declared was broadened and relaxed in *Dennis v. United States,* 341 U.S. 494. But the true reach of Dennis can only be properly assessed by reading it in connection with *Yates v. United States,* 354 U.S. 298. The court in Yates at page 320 reiterates the well-established distinction, relied upon by us in Danskin, between "the advocacy and teaching of concrete action for the forcible overthrow of the Government" (which is not within the protection of the First Amendment) and "of principles divorced from action" (which falls within the First Amendment's protection). The court in Yates added: "The essence of the Dennis holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action . . . is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur. This is quite a different thing from the view of the District Court here that

mere doctrinal justification of forcible overthrow, if engaged in with the intent to accomplish overthrow, is punishable *per se* under the Smith Act. That sort of advocacy, even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action to be regarded as the kind of indoctrination preparatory to action which was condemned in Dennis." (354 U.S. pp. 321-322.) Indeed, the very basis of the Yates holding was that mere proof of membership in the Communist Party *per se*, divorced from proof of "advocacy and teaching of concrete action for the forcible overthrow of the Government" is insufficient to support a conviction under the Smith Act. We can find no such broadening of the definition of the "clear and present danger rule" in Dennis as explained in Yates as to justify the exclusion of Communists and Communist-affiliates from the exercise of the rights of free speech and peaceable assembly for lawful purposes, or to lead to any logical conclusion that just because they are Communists or Communist-affiliates they will *per se* advocate and teach in a public meeting the concrete action of forcible overthrow of the Government if permitted to hold such public meeting in a school building.

The other argument, that the findings that the Communist Party constitutes a continuing conspiracy to overthrow the Government by force and violence justifies the exclusion from the use of school buildings of them and their affiliates, rests principally on the case

of *American Communications Assn., C.I.O. v. Douds*, 339 U.S. 382. In that case, in which only six of the nine justices participated, the court upheld the requirement of the Act of Congress (§ 9, subd. (h) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, 29 U.S.C. § 159, subd. (h)) requiring each officer of a labor union to file with the National Labor Relations Board an affidavit that he is not a member of the Communist Party or affiliated with it, and does not believe in, and is not a member of nor supports any organization that believes in or teaches, the overthrow of the United States Government by force or any illegal or unconstitutional means, as a condition to recourse by the union to the board. A majority of the court upheld this requirement against the contention that it unconstitutionally infringed the right of such officers to freedom of speech (more properly, perhaps, the cognate right of freedom of association, see, e.g., *N.A.A.C.P. v. Alabama*, 357 U.S. 449) on the ground that Congress had enacted the provision to prevent "political strikes," and that this action was justified by evidence taken before a congressional committee "which tended to show that Communists and others proscribed by the statute had infiltrated union organizations not to support and further trade union objectives . . . but to make them a device by which commerce and industry might be disrupted when the dictates of political policy required such action." (339 U.S. p. 389.) Also "that Communist leaders of labor unions had in the past and would con-

tinue in the future to subordinate legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in support of the policies of a foreign government . . . some union leaders who hold to a belief in violent overthrow of the Government . . . likewise regard strikes and other forms of direct action designed to serve ultimate revolutionary goals as the primary objectives of labor unions which they control." (339 U.S. p. 388.) The court carefully pointed out at page 396 that the question of freedom of speech in that case was not directly, but only tangentially, involved, saying: "Government's interest here is not in preventing the dissemination of Communist doctrine or the holding of particular beliefs because it is feared that unlawful action will result therefrom if free speech is practiced. Its interest is in protecting the free flow of commerce from what Congress considers to be substantial evils of conduct that are not the product of speech at all. Section 9 (h), in other words, does not interfere with speech because Congress fears the consequence of speech; it regulates harmful conduct which Congress has determined is carried on by persons who may be identified by their political affiliations and beliefs."

The inappositeness of this reasoning to the statute before us is clear. The very purpose which the court stated was not present in Douds is the only purpose of the Legislature here, to interfere, not tangentially for another legitimate purpose with speech, but to pre-

vent the speech itself. Moreover, the parallel claimed does not exist. In Douds the evidence before Congress established that strikes had been called by subversive union leaders solely for disruptive political purposes without regard to the union's welfare. The findings of Congress and our Legislature that the Communist Party is a continuing conspiracy etc. is not a parallel. It would only be parallel if Congress and the Legislature had found that Communists and Communist-affiliates had advocated or taught the concrete action of the violent and unlawful overthrow of the Government in public meetings. No such finding was made and we apprehend that no such finding could be supported by any substantial evidence. Indeed it is the essence of a *conspiracy*, such as was found, to operate in secrecy and not in the open light of day or in public meetings in schools or elsewhere.

Going to a broader consideration, giving regard to the purpose behind this legislation and giving section 16564 its full scope, without regard to the requirement that in order to secure consideration of its application at all, the applicant must deny all Communist affiliation, we would still be confronted with a serious constitutional question of the extent to which what amounts to a prior restraint on the exercise of the rights of free speech and assembly can properly go, and the factual basis necessary to the exercise of such prior restraint. That the power of respondent board to refuse the use of the school to an

applicant upon making the finding required by section 16564 amounts to a prior restraint is clear, since it forecloses the use of the school and prevents the applicant from *there* holding its meeting upon a prior determination of the board.

The rights of freedom of assembly and of speech guaranteed by the Constitution, like the cognate rights of freedon of the press and of petition, have a paramount and preferred place in our democratic system. As pointed out by Mr. Justice Rutledge in *Thomas v. Collins,* 323 U.S. 516, at page 530, "the usual presumption supporting legislatior is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." "That priority," he adds, "gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. (Citation.)

"For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the veil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have

clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedon in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable."

Against the exercise of these paramount and preferred rights, the Legislature has attempted to set up a system of prior restraint. Upon a finding by the school board that the school's "civic center" *will be* used "for the commission of any act intended to further . . . the overthrow of the Government . . . by force, violence, or other unlawful means," the school board is empowered to deny the use of the center in advance. This amounts to a censorship in advance of the right to assembly and free speech upon the mere determination of a probability of its future misuse. Prior censorship upon such a prophetic finding can certainly only be justified, if at all, upon the clearest sort of showing that such misuse will with reasonable certainty occur. The state and the federal government can, as the federal government has done in the Smith Act, make the actual commission of such

acts criminal. It seems obvious that attempts at censorship by prior restraint should be more closely scrutinized to detect constitutional infirmity than such *post hoc* methods of restraint by criminal sanction. The danger of censorship in advance is that, in attempting to prevent the commission of forbidden acts in advance, it will also prevent lawful assemblies and the lawful exercise of free speech upon an erroneous (even if plausible) finding in advance that the applicant intends to engage in unlawful assembly and unlawful speech. In discussing the prior censorship of the exercise of the freedom of the press, the court said in *Lovell v. Griffin*, 303 U.S. 444, at page 451: "The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish '*without* a license what formerly could be published only *with* one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision." (Emphasis the court's.) See the very extensive discussion of the whole subject of prior restraint in *Near v. Minnesota*, 283 U.S. 697, 713-723; cf. *Hague v. C.I.O.*, 307 U.S. 496, 516; *Schneider v. State*, 308 U.S. 147, 161 et seq.; *Thornhill v. Alabama*, 310 U.S. 88, 95-96; *Cantwell v. Connecticut*, 310 U.S. 296, 306.

It does not appear that disclosure of membership in the Communist Party or any of its affiliates or supporting organizations has a reasonable tendency to prove that the forbidden acts would be committed in a public meeting in a school building. The Dennis and Yates cases, the many congressional and legislative investigations, and the intensive and not always successful efforts of the F.B.I. to uncover subversion all teach us that acts of unlawful incitement when committed are secretly committed in carefully selected groups, not openly in public meetings. In Yates, for example, no criminal incitement was proved in any public meeting and no such criminal incitement was ever published in the Daily People's World. (See 354 U.S. pp. 331, 333.) We cannot escape the conclusion that the legislation under attack requires an unconstitutional disclosure and attempts to create an unconstitutional power of prior restraint upon the rights of free assembly and free speech. It has more than once been suggested that in the struggle against the Communist threat, we must be careful not to adopt the Communist methods lest we sacrifice our precious freedoms in the very effort to preserve them. We said in Danskin (28 Cal. 2d p. 554): "It may seem ironic that others who hold such beliefs" (i.e., the overthrow of government by violence) "may seek from the state the privilege of a public forum. But when the principles of free speech and peaceable assembly are at stake, the state has more to gain than to lose by a generous tolerance of the convictions and affiliations

of its many citizens so long as they present no clear and present danger to the community." In the balancing of the preferred rights of peaceable assembly and freedom of speech against the more than doubtful likelihood that Communists or Communist supporters would be so rash as to subject themselves to the certainty of criminal prosecution by committing "acts" in a public assembly proscribed by this statute, the balance should fall on the side of protecting the constitutionally guaranteed freedoms.

As appears from their petition for writ of mandate, petitioners sought monthly meeting dates in the Los Angeles school auditorium from January through June 1960. Since the June date has now passed, the question arises as to whether the proceeding presents issues that should be judicially determined: as a guide for such future applications as might be made for the school premises; for the settlement of public questions necessarily involved; and because of the unlikelihood that a final judicial decision could ever be made within the limited time of a series of proposed meeting dates. To overcome the effect of the expiration of the June date, petitioners inform us that they have in fact made another application for a new series of monthly meeting dates at the John Burroughs Junior High School from October 1960 through June 1961.

Petitioners rely on *Rattray v. Scudder*, 67 Cal. App. 2d 123, where mandate was sought directing the Real Estate Commissioner to set aside an order revok-

ing a real estate broker's license. The superior court directed the issuance of the writ and awarded costs to petitioner. The Real Estate Commissioner appealed. After the writ was issued but before the hearing on appeal, the term of the license had expired. The licensee moved to dismiss the appeal as moot. In denying the motion, the court said: "As a practical matter this judgment (for issuance of the writ), if allowed to stand, will have a direct bearing and real effect upon any renewal of the respondent's license. . . . Moreover, important public questions are involved both directly, with respect to this judgment, and indirectly, through the effect on future appeals in such cases which could not be determined before the license in question had expired." (67 Cal. App. 2d p. 128.)

We are satisfied that we should not treat the question as moot, and that petitioner's continuing right to make application for the use of the school facilities for their meetings is properly at issue.

In view of our conclusions herein expressed, other points urged by petitioners need not be considered.

Let a peremptory writ of mandate issue directing respondent to act upon any pending or future application by petitioners to be allowed to hold a public meeting or meetings in the John Burroughs Junior High School Auditorium without requiring from pe-

titioners a "Statement of Information" in the form prescribed by section 16565 of the Education Code.

DOOLING, J.

WE CONCUR:

GIBSON, C. J.
TRAYNOR, J.
PETERS, J.

EXHIBIT "A"

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, a California Corporation; REV. JOHN R. CLARK, HARVEY FURGATCH, DR. HARRY RUJA, JOHN W. HAMBURG and IRWIN GOSTIN, *Petitioners,* vs. BOARD OF EDUCATION OF THE CITY OF SAN DIEGO, *Respondent.*	L. A. 25789

Petitioners seek a writ of mandate to compel the Board of Education of the City of San Diego to grant their application for the use of certain school buildings in San Diego in which to hold a series of monthly public meetings on the general theme of "Civil Liberties and the Constitution." As in the companion Los Angeles School Board case (L.A. 25788, ante p.), petitioners refused to furnish the required "Statement of Information" (Ed. Code § 16565) and the board denied petitioners' use of the requested school premises.

The questions presented are identical with those presented in the Los Angeles case, and the disposition should be the same.

Let a peremptory writ of mandate issue directing respondent to act upon any pending or future application by petitioners to be allowed to hold a public meeting or meetings in any of the school buildings described in the petition without requiring from petitioners a "Statement of Information" in the form prescribed by section 16565 of the Education Code.

DOOLING, J.

WE CONCUR:

GIBSON, C. J.
TRAYNOR, J.
PETERS, J.

APPENDIX "B"

AMERICAN CIVIL LIBERTIES UNION V. BOARD OF EDUCATION OF THE CITY OF LOS ANGELES.

L. A. 25788

DISSENTING OPINION

I dissent.

We are here confronted with the simple question of whether the Legislature may ordain that those who seek permission to use our public schools, erected primarily for educational purposes, may be required as a condition to the enjoyment of such use to declare that the school property will not be used for the commission of any *act* intended to further any program or movement the purpose of which is to accomplish the overthrow of the government of the United States or of the State of California by force, violence or other unlawful means, and that to the best of the applicant's knowledge, the organization he represents is not a communist-action organization or communist-front organization required by law to be registered with the Attorney General of the United States. To deny school boards the right to make this inquiry is a radical departure from what this court held in *Payroll Guar. Assn. v. Board of Education*, 27 Cal. 2d 197

wherein at page 200 it said "The respondent board may not only make reasonable regulations with regard to the use of the school auditorium for authorized purposes but may deny an application for its use if (1) such use would further, directly or indirectly, the overthrow of the present government of the United States or any State, Territory or Possession thereof, by force or violence or other unlawful means, ..." And again in *Danskin v. San Diego Unified Sch. Dist.*, 28 Cal. 2d 536, 553-554, we said "The state must be on the alert for any clear and present danger to the community, *sensitive to the warning signals,* the ambiance in which a forum is planned, the atmosphere that envelops it. *It cannot look with equanimity upon those whose words or actions have already left in their wake a trail of violence.*

"Always it must distinguish, however, between speech, no matter how unorthodox, that remains on a theoretical plane, *and speech, no matter how skillfully intoned that creates a clear and present danger to the community.*" (Emphasis added.)

The statutes here in question are designed to protect the people not against what communists or kindred ~~subversive~~ organizations or individuals advocate or believe, but against what the Legislature has considered they *have done* and are *likely* to do again. Conceding that restriction on speech and assembly cannot be sustained unless the evil itself is "substan-

tial" and "relatively serious," or sometimes "extremely serious" thus creating what is commonly called "clear and present danger," nevertheless, as was said in *Dennis v. United States*, 341 U.S. 494, 509 [71 S. Ct. 857, 95 L.Ed. 1137], "Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, *for if a society cannot protect its very structure from armed internal attack*, it must follow that no subordinate value can be protected. If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase 'clear and present danger' of the utterances bringing about the evil within the power of Congress to punish.

"*Obviously, the words cannot mean that before the Government may act, it must wait until the putsch is is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.* The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force, even though

doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of probability of success, or the immediacy of a successful attempt." (Emphasis added.)

The majority opinion places its imprimatur upon a decision that holds that the people of the State of California must open their schools as forums wherein groups aiming at the destruction of the federal and state governments by force and violence may assemble and wherein those in attendance may be indoctrinated with that philosophy in preparation for future violent action. With this I cannot agree. "It has been established by legislative findings and judicial decisions that the Communist Party is a continuing conspiracy against our government. (Citations.)" *(Board of Education v. Mass,* 47 Cal. 2d 494, 497-498.) And the Legislature has declared that "communism is a political theory that the presently existing form of government of the United States or of this State shall be changed by force, violence, or other unconstitutional means, to a totalitarian dictatorship.[1] . . . ." (Ed. Code. § 8275.)

[1]The Legislature of this state made the following finding in 1953 with respect to the world communism movement:

"(a) There exists a world-wide revolutionary movement to establish a totalitarian dictatorship based upon force and violence rather than upon law.

The legislation with which we are here concerned does not restrain speech or assembly as such. Its manifest objective is the protection of our public schools from the commission of subversive acts therein, and asks the applicant for use of our school buildings only to state under oath that "To the best of his knowledge" the school property will not be used ". . . to further any program or movement, the purpose of which is to accomplish the overthrow of the government of the United States or of the state by force, violence, or other unlawful means. . . " Unless the applicant has knowledge that the school property is to be used for the advocacy of subversive acts, what other reason would serve to deter him from signing the Statement of Information? History, even in our times warns us

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"(b) This world-wide revolutionary movement is predicated upon and it is designed and intended to carry into execution the basic precepts of communism as expounded by Marx, Lenin, and Stalin.

"(c) Pursuant to the objectives of the world communism movement, in numerous foreign countries the legally constituted governments have been overthrown and totalitarian dictatorships established therein against the will of the people, and the establishment of similar dictatorships in other countries is imminently threatening. The successful establishment of totalitarian dictatorships has consistently been aided, accompanied, or accomplished by repeated acts of treachery, deceit, teaching of false doctrines, teaching untruth, together with organized confusion, insubordination, and disloyalty, fostered, directed, instigated, or employed by communist organizations and their members in such countries.

"(d) Within the boundaries of the State of California there are active disciplined communist organizations presently functioning for the primary purpose of advancing the objectives of the world communism movement, which organizations promulgate, advocate, and adhere to the precepts and the principles and doctrines of the world communism movement. These communist organizations are characterized by identification of their programs, policies, and objectives with those of the world communism movement, and they regularly and consistently cooperate with and endeavor to carry into execution programs, policies and objectives substantially identical to programs, policies, and objectives of such world communism movement.

"(e) One of the objectives of the world communism movement is to place its members in state and local government positions and in state supported educational institutions. If this objective is successful, propaganda can be dis-

that eternal vigilance is still the price of liberty and that a free people must not wait until "the plans have been laid and the signal is awaited" for violent action before taking steps to prevent the fruition of subversive propaganda. The statutes now engaging our attention do not proscribe the advocacy of abstract doctrine but are aimed at the teaching of concrete action for the *forcible* overthrow of the government. It therefore does no violence to due process nor to the principles enunciated by this court in the Danskin case, *supra,* relied upon by the majority opinion.

The statutes with which we are here confronted represent an effort by the Legislature of California to prevent the public school buildings in this state from be-

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seminated by the members of these organizations among pupils and students by those members who would have the opportunity to teach them and to whom, as teachers, they would look for guidance, authority, and leadership. The members of such groups would use their positions to advocate and teach their doctrines and teach the prescribed Communist Party line group dogma or doctrine without regard to truth of free inquiry. This type of propaganda is sufficiently subtle to escape detection.

"There is a clear and present danger, which the Legislature of the State of California finds is great and imminent, that in order to advance the program, policies and objectives of the world communism movement, communist organizations in the State of California and their members will engage in concerted effort to hamper, restrict, interfere with, impede, or nullify the efforts of the State and the public agencies of the State to comply with and enfore the laws of the State of California and their members will infiltrate and seek employment by the State and its public agencies." (Gov. Code, § 1027.5.)

The Congress of the United States, in adopting the Internal Security Act of 1950, declared the dangers of the Communist movement in the following terms (Act of Sept. 23, 1950, ch. 1024, tit. I, § 2, 64 Stats. 987; 50 U.S.C.A. § 781):

"As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress hereby finds that—

"(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization."

coming forums for the propagation and advocacy of *acts* of subversion, or *acts* intended to support subversive elements. This is well within the recognized right of government to protect itself from all enemies —domestic as well as foreign.

For the foregoing as well as the additional reasons advanced by Mr. Presiding Justice Fox, speaking for a unanimous court when this cause was pending before the District Court of Appeal, Second Appellate District, Division Two (*American Civil Liberties Union of So. Calif. v. Board of Education*, 5 Cal. Rptr. 215), I would discharge the alternative writ and deny the petition for a peremptory writ of mandate.

WHITE, J.

More recently, in adopting the Communist Control Act of 1954 (Public Law 637, ch. 886, 68 Stats. 775), our Congress expressed its awareness of the true nature of the Communist Party program and methods in the following findings:

"Sec. 2. The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States . . ." and "The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its members, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States."

AMERICAN CIVIL LIBERTIES UNION V. BOARD OF EDUCATION OF THE CITY OF LOS ANGELES.

L. A. 25788

DISSENTING OPINION OF SCHAUER, J. TO OPINION OF DOOLING, J.

I concur in the reasoning and conclusions of Justice White and also am in full accord with, and by reference adopt, the opinion prepared for the District Court of Appeal (when this case was before that court, reported in 5 Cal. Rptr. 215) by Presiding Justice Fox and concurred in by Justice Ashburn and Justice pro tempore Kincaid. For all of the reasons enunciated by Justices White, Fox, Ashburn and Kincaid the alternative writ should be discharged and the petition denied.

SCHAUER, J.

I CONCUR:

McCOMB, J.

EXHIBIT "B"

AMERICAN CIVIL LIBERTIES UNION V. BOARD OF EDUCATION OF THE CITY OF SAN DIEGO

L. A. 25789

DISSENTING OPINION

I dissent.

Upon the grounds and for the reasons stated in my dissenting opinion in *American Civil Liberties Union of Southern California, a California Corporation; Eason Monroe, Director and Willard Carpenter, Associate Director, Petitioners, v. Board of Education of the City of Los Angeles,* Respondent, L. A. 25788, this day filed, *ante* p.——, I would discharge the alternative writ and deny the petition for a peremptory writ of mandate.

WHITE, J.

AMERICAN CIVIL LIBERTIES UNION V. BOARD OF EDUCATION OF THE CITY OF SAN DIEGO

L, A. 25789

DISSENTING OPINION OF SCHAUER, J. TO OPINION OF DOOLING, J.

For the reasons stated in the dissenting opinion of Justice White in *American Civil Liberties Union v. Board of Education of the City of Los Angeles, ante,* p.——, and for the reasons stated in the opinion of Presiding Justice Fox, concurred in by Justice Ashburn and Justice pro tempore Kincaid, when that case was before the District Court of Appeal (reported in 5 Cal. Rptr. 215), I would discharge the alternative writ and deny the petition for a peremptory writ of mandate.

SCHAUER, J.

I Concur:

McCOMB, J.

APPENDIX "C"

[Civil No. 24573. Second Dist., Div. Two. May 24, 1960.]

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA et al., Petitioners, v. BOARD OF EDUCATION OF THE CITY OF LOS ANGELES, Respondent.

PROCEEDING in mandamus to compel the Board of Education of the City of Los Angeles to grant an application for use of certain public school buildings in which to hold public meetings. Writ denied.

A. L. Wirin and Abraham Gorenfeld for Petitioners.

Harold W. Kennedy, County Counsel, and Ronald L. Schneider, Deputy County Counsel, for Respondent.

FOX, P. J.—Petitioners seek a writ of mandate to compel the Board of Education of the City of Los Angeles to grant their application for the use of certain public school buildings in which to hold a series of monthly meetings which would be open to the public.

Petitioners' application for the use of school buildings was denied by respondent board because petitioners failed and refused to make and deliver to the board a written "Statement of Information" as required by section 16565 of the Education Code, which implements section 16564 of the same code (for-

merly, §§ 19440 and 19441). The pertinent portion of the latter section reads:

"Any use, by an individual, society, group, or organization for the commission of any act intended to further any program or movement the purpose of which is to accomplish the overthrow of the Government of the United States or of the State by force, violence, or other unlawful means shall not be permitted or suffered." The material portions of the implementing section (§ 16565), which includes the required statement of information, provide:

"No governing board of a school district shall grant the use of any school property to any person or organization for any use in violation of Section 16564.

"For the purpose of determination by such governing board whether or not any individual, society, group or organization applying for the use of such school property intends to violate Section 16564, the governing board shall require the making and delivery to such governing board, by such applicant of a written statement of information in the following form:

STATEMENT OF INFORMATION

"The undersigned states that, to the best of his knowledge, the school property for use of which application is hereby made will not be used for the commission of any act intended to further any program or movement the purpose of which is to accomplish

the overthrow of the Government of the United States by force, violence or other unlawful means;

"That ..... , the organization on whose behalf he is making application for use of school property, does not, to the best of his knowledge, advocate the overthrow of the Government of the United States or of the State of California, by force, violence, or other unlawful means, and that, to the best of his knowledge, it is not a communist-action organization or communist-front organization required by law to be registered with the Attorney General of the United States. This statement is made under the penalties of perjury.

....

Signature

"The school board may require the furnishing of such additional information as it deems necessary to make the determination that the use of school property for which application is made would not violate Section 16564 of the Education Code."

Petitioners' refusal to furnish the statement of information was based on the ground that the requirement to furnish such information violated their rights and liberties under the Constitutions of both the United States and the State of California.

At the outset we must determine the meaning and purpose of the above quoted sections of the Education Code. This may readily be ascertained by con-

sidering together the quoted portion of section 16564 and the first paragraph of section 16565, also quoted, *supra*. When so considered, it is clear that the effect of these two sections is to place every school board under a legislative mandate not to permit any "individual, society, group or organization" to make "any use" of school property "*for the commission of any act* intended to further any program or movement the purpose of which is to accomplish the overthrow" of either the federal or state government by force, violence or other unlawful means. By these sections the legislature has declared that school buildings shall neither be used for the commission of subversive acts nor acts in furtherance of any movement that has for its objective subversive results. It will be noted that these sections prohibit the use of school buildings for the commission of *acts* as distinguished from the mere academic discussion of revolutionary doctrine.

The second paragraph of section 16565 implements the foregoing legislative intent by providing for the submission to the school board of the required "Statement of Information" upon which the board may determine in advance whether or not the proscribed *acts* are contemplated by the applicant. The first paragraph of the "Statement of Information" requires the applicant to state (under penalty of perjury) that "to the best of his knowledge" no use will be made of the school property "for the commission of any act in-

tended to further any program or movement the purpose of which is to accomplish the overthrow of the Government of the United States by force, violence, or other unlawful means." This paragraph follows substantially the wording of the first paragraph of section 16564. As we have said, such language concerns itself only with acts of subversion or acts intended to further the purposes of any subversive element. The second paragraph of the "Statement of Information" requires that the applicant state that, "to the best of his knowledge" the organization he represents does not "advocate" the violent overthrow of the federal or state governments and that it is not a "communist-action" or "communist-front" organization "required by law to be registered with the Attorney General of the United States." The deliberate use of the word "advocate" has, in this context, a very narrow meaning. The present statute was adopted by the Legislature subsequent to a decision by the Supreme Court of this state which held unconstitutional a statute prohibiting the use of school property by any person or group having as its "object" the overthrow, or the "advocacy" of the overthrow, of the federal or state governments by violence. (*Danskin v. San Diego Unified School District*, 28 Cal. 2d 536.) The court viewed the term "advocacy" in its broad sense; i.e., the mere expression of political philosophy and doctrines in the public forum. We must assume that sections 16564 and 16565 were deliber-

ately formulated to comply with the pronouncements and holding of the court in the Danskin case. With this in mind, we must determine the meaning which the term "advocate" has acquired since the year 1946 when the Danskin case was decided.

"Advocacy" is no longer a general term meaning dissemination of doctrines and philosophical concepts in the market place of ideas. It has become a word of art with a narrow and strictly confined meaning when used in relation to the proscription of subversive and revolutionary activities. The case of *Yates v. United States,* 354 U.S. 298 decided in 1957, is apposite. Mr. Justice Harlan, speaking for the majority, in construing the term "advocate" as deliberately used by Congress in the Smith Act, stated: " . . . our first duty is to construe this statute [18 U.S.C. §§ 371, 2385]. In doing so we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked, or that it used the words 'advocate' and 'teach' in their ordinary dictionary meanings when they had already been construed as terms of art carrying a special and limited connotation. (Citations.) . . . beyond all question . . . Congress was aware of the distinction between advocacy or teaching of abstract doctrine and the *advocacy* or teaching of *action,* and . . . it did not intend to disregard it. *The statute was aimed at the advocacy and teaching of concrete action for the forcible overthrow of the Government, and not of*

principles divorced from action." (354 U.S. at 319, 320.) (Emphasis added.) See also *Dennis v. United States,* 341 U.S. 494, wherein "advocacy" and "discussions" were similarly distinguished.

Therefore, we hold that the term "advocate the overthrow of the Government" in the "Statement of Information" was deliberately used by the Legislature in the narrow sense defined so explicitly in the Yates case. The Legislature may not be assumed to have enacted a useless and unconstitutional provision in the face of the peremptory commands of the Danskin decision. Thus, the purposes of section 16564 are properly served by this portion of the "Statement of Information," in that an organization which advocates the overthrow of the Government is an organization which is very likely to commit acts toward that end.

The last part of the second paragraph of the "Statement of Information" refers to "communist-front" and "communist-action" organizations required to register with the Attorney General of the United States. Again this information implements the intent and purpose of section 16564. The sole interest of the school board is to determine in advance whether acts of subversion will or will not be committed on school premises by the applicant in question. If the applicant is a "communist-front" or "communist-action"

organization, the likelihood of such a group committing acts tending to further its own interests is substantial. Furthermore, "it has been established by legislative findings and judicial decisions that the Communist Party is a continuing conspiracy against our government. (Citations.)" (*Board of Education v. Mass* (1956), 47 Cal. 2d 494, 497-498.) And the legislature has declared that "communism is a political theory that the presently existing form of government of the United States or of this state shall be changed, by force, violence or other unconstitutional means, to a totalitarian dictatorship.[1] . . ." (Ed. Code § 8275, enacted 1951.)

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[1]The Legislature of this state made the following finding in 1953 with respect to the world communism movement:

"(a) There exists a world-wide revolutionary movement to establish a totalitarian dictatorship based upon force and violence rather than upon law.

"(b) This world-wide revolutionary movement is predicated upon and it is designed and intended to carry into execution the basic precepts of communism as expounded by Marx, Lenin, and Stalin.

"(c) Pursuant to the objectives of the world communism movement in numerous foreign countries the legally constituted governments have been overthrown and totalitarian dictatorships established therein against the will of the people, and the establishment of similar dictatorships in other countries is imminently threatening. The successful establishment of totalitarian dictatorships has consistently been aided, accompanied, or accomplished by repeated acts of treachery, deceit, teaching of false doctrines, teaching untruth, together with organized confusion, insubordination, and disloyalty, fostered, directed, instigated, or employed by communist organizations and their members in such countries.

"(d) Within the boundaries of the State of California there are active disciplined communist organizations presently functioning for the primary purpose of advancing the objectives of the world communism movement, which organizations promulgate, advocate, and adhere to the precepts and the principles and doctrines of the world communism movement. These communist organizations are characterized by identification of their programs, policies, and objectives with those of the world communism movement, and they regularly and consistently cooperate with and endeavor to carry into execution programs, policies and objectives substantially identical to programs, policies, and objectives of such world communism movement.

"(3) One of the objectives of the world communist movement is to place its members in state and local government positions and in state supported

It is eminently clear that any communist group would be within the proscribed class as defined by section 16565. Such information is therefore vital to a determination by the school board as to whether or not the intended use of school property will be in violation of section 16564.

Petitioners first contend that the "Statement of Information," required of all applicants who desire to make use of public school property, is an unconstitutional infringement of their rights of free speech and assembly under the First Amendment to the Constitution of the United States and as guaranteed by the California Constitution. They rely principally upon *Danskin v. San Diego Unified School District, supra.*

The statute held unconstitutional in the Danskin case (Ed. Code, § 19432) read as follows: "Any use,

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educational institutions. If this objective is successful, propaganda can be disseminated by the members of these organizations among pupils and students by those members who would have the opportunity to teach them and to whom, as teachers, they would look for guidance, authority, and leadership. The members of such groups would use their positions to advocate and teach their doctrines and teach the prescribed Communist Party line group dogma or doctrine without regard to truth or free inquiry. This type of propaganda is sufficiently subtle to escape detection.

"There is a clear and present danger, which the Legislature of the State of California finds is great and imminent, that in order to advance the program, policies and objectives of the world communism movement, communist organizations in the State of California and their members will engage in concerted effort to hamper, resist, interfere with, impede, or nullify the efforts of the State and the public agencies of the State to comply with and enforce the laws of the State of California and their members will infiltrate and seek employment by the State and its public agencies." (Gov. Code, § 1027.5.)

The Congress of the United States, in adopting the Internal Security Act of 1950, declared the dangers of the Communist movement in the following terms (Act of Sept. 23, 1950, ch. 1024, tit. I, § 2, 64 Stats. 987; 50 U.S.C.A. § 781):

As a result of evidence adduced before various committees of the Senate and House of Represntatives, the Congress finds that

by any individual, society, group, or organization which has as its object or as one of its objects, or is affiliated with any group, society or organization which has as its object or one of its objects the overthrow or the advocacy of the overthrow of the present form of government of the United States or of the State by force, violence, or other unlawful means shall not be granted, permitted, or suffered.

"Any person who is affiliated with any organization, which advocates or has for its object or one of its objects the overthrow of the present government of the United States or any State, Territory, or Possession thereof by force or violence or other unlawful means, or any organization of persons which advocates or has for its object or one of its objects the overthrow of the present government of the United States or any State, Territory, or Possession thereof,

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"(1) There exists a world Communist movement which in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization."

More recently, in adopting the Communist Control Act of 1954 (Public Law 637, ch. 886), our Congress expressed its awareness of the true nature of the Communist Party program and methods in the following findings:

"Sec. 2. The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. . . ." and "The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States."

by force or violence or other unlawful means, is hereby declared to be and is characterized, a subversive element.

"Notwithstanding any of the other terms of this chapter, no such governing board shall grant the use of any school property to any person or organization who or which is a subversive element as herein defined.

"For the purpose of determination by such governing board whether or not such person or such organization of persons applying for the use of such school property, is a subversive element as herein defined, such governing board may require the making and delivery to such governing board, by such person or any members of such organization, of affidavits in form prescribed by such governing board, stating facts showing whether or not such person or organization is a subversive element as herein defined.

"Reference is hereby made to the provision of law relating to perjury and the punishment therefor shall be applicable to persons making and delivering affidavits provided for under the provisions of this chapter."

In compliance with the above, the San Diego School Board required the petitioners to subscribe to the following oath:

"I, ... being first duly sworn, on oath say:

"I am a member of the San Diego Civil Liberties Committee affiliated with the Southern California Branch of the American Civil Liberties Union and one of the applicants for the use of Roosevelt Junior High School auditorium for a series of meetings on January 25th, February 22nd, March 22nd, April 26th, May 24th, and June 28, 1946.

"I do not advocate and I am not affiliated with any organization which advocates or has as its object or one of its objects the overthrow of the present Government of the United States or of any State by force or violence, or other unlawful means." The validity of the oath requirement was held to depend upon the validity of section 19432 of the Education Code. The court held that section 19432 was invalid on its face as being in violation of the First and Fourteenth Amendments of the Constitution of the United States and of the guarantees of freedom of speech and assembly in the Constitution of California.

The ultimate reason for striking down this statute was the Supreme Court's view that it made "convictions and affiliations a condition of free speech" and that such a restriction "is striking at something less than clear and present danger." (28 Cal.2d 544.) Two distinctions between the Danskin case and the instant situation are immediately apparent. In *Danskin*, the statute involved only beliefs and convictions, not *acts* as in present sections 16564 and 16565. Moreover,

there has been a substantial change in the rule of "clear and present danger" as that phrase has since been interpreted and applied by the Supreme Court of the United States.

We first consider the requirement of the present statute that the use of public school buildings be denied to those individuals and groups which contemplate *acts* of subversion or *acts* intended to further the purposes of subversive organizations. This language contemplates more than mere "prediction that is not calculated or intended to be presently acted upon, thus leaving opportunity for general discussion and the calm processes of thought and reason." (*Schneiderman v. United States,* 320 U.S. 118, 157-158, quoted with approval in *Danskin v. San Diego Unified School District, supra.)* No does the statute here under consideration "compel 'subversive elements' directly to renounce their convictions and affiliations." (*Danskin v. San Diego Unified School District, supra,* p. 546) or abridge "the ancient right to free speech" by denying "access to a forum in a school building to 'subversive elements' . . . because [the legislature] believes the privilege of free assembly in a school building should be denied to those whose convictions and affiliations it does not tolerate." (28 Cal.2d p. 545.)

On the contrary, this statute denies access to school property to those who would use the property as a place in which to commit *acts* of subversion or treason

or acts tending to further the cause of subversion and treason by direct support to organizations having such results as their principal object. An "act" as opposed to an academic argument creates the crucial difference between the present sections and the one held unconstitutional in the *Danskin* case. Argument may be countered by argument but an act is an accomplished fact. An act by definition is the application of force which accomplishes a *result,* though it may fall short of its intended objective. Obviously, the Legislature is concerned with the *results* of acts of subversion for therein lies the threat to our free, democratic society. "The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held *but as to its purpose;* not as to the relations of the speakers, *but whether their utterances transcend the bounds of the freedon of speech which the Constitution protects."* *(DeJonge v. Oregon,* 299 U.S. 353, 365.) Emphasis added,) Moreover, "there is a material difference between agitation and exhortation calling for present violent action . . . and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time." *(Schneiderman v. United States, supra,* p. 157.) *A fortiori,* if, instead of *speech* intended to incite rebellion and treason (which would be one of the *acts* proscribed by the statute) the applicant intended to *commit other overt acts* of subversion or acts intended to further

subversive interests, the intended use could not be entitled to the protection of the constitutional freedoms.

Thus the distinction in this regard between the Danskin case and the instant matter is clear. The prior statute forbade the use of schools to "subversive elements" even though the assembly was to be lawfully conducted and no *acts* of subversion were contemplated. Under the present statute, only *acts* are proscribed.

The second distinguishing feature between this case and the Danskin decision is the marked change in the "clear and present danger" doctrine (originally enunciated in *Schenck v. United States,* 249 U.S. 47, 52. Our Supreme Court relied principally on the holding of the United States Supreme Court in *Bridges v. California,* 314 U.S. 252, in determining that the statute in the *Danskin* case forbade activities which did not constitute a "clear and present danger" of bringing about "substantive evils." The *Bridges* court, quoting from Chief Justice Hughes' dissent in *Abrams v. United States,* 250 U.S. 616, 630, said: "'We should be eternally vigilant against attempts to check the expressions of opinions that we loath and believe to be fraught with death, *unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.*'" Again, the *Bridges* court quoted Mr. Justice Brandeis' dissent in *Whitney v. California,* 274 U.S. 357, 376: "'To justify suppression of free

speech *there must be reasonable ground to fear that evil will result* if free speech is practiced. *There must be reasonable ground to believe that the danger apprehended is imminent.'"* (Emphasis the Supreme Court's.) The key word in these quotations is the word "imminent." The reasoning seems to be that no action abridging the free speech of subversive groups may be taken until the revolution has been planned and the moment to strike is awaited by armed terrorists. Until that moment, the danger is not an imminent one; and there is still a chance that the terrorists and the revolutionists will have a change of heart because they have participated in a free exchange of ideas in the public forum.

The impracticability of this notion is beyond comprehension and is reminiscent of the disaster at Pearl Harbor and the infiltration and ultimate subjugation of the Eastern European countries by the communists since World War II. Fortunately, the *Bridges* definition of "clear and present danger" is not in harmony with the more recent decisions. The modern interpretation is found in *American Communications Assn. v. Douds,* 339 U.S. 382 and *Dennis v. United States,* 341 U.S. 494.

In the Douds case, the court held constitutional section 9(h) of the Labor Management Relations Act (29 U.S.C., §159 (h)), which, as a condition of a labor union's utilizing the privileges afforded by the act,

requires its officers to file a non-communist affidavit with the National Labor Relations Board. The court held that "political strikes" were the substantive evil at which section 9(h) was aimed and that such strikes were a legitimate interest of Congress under the Commerce power. Discussing the question of whether or not the possibility of political strikes called by communist labor leaders constitutes a "clear and present danger," the court said: "The Board does not contend that political strikes, the substantive evil at which section 9(h) is aimed, are the *present* or *impending* products of advocacy of the doctrines of communism or the expression of belief in overthrow of government by force. On the contrary, it points out that such strikes are called by persons who, so Congress has found, have the will and power to do so *without* advocacy [emphasis the court's] or persuasion that seeks acceptance in the competition of the market. Speech may be fought with speech. Falsehoods and fallacies must be exposed, not suppressed, *unless there is not sufficient time to avert the evil consequences of noxious doctrine by argument and education . . . But force may and must be met with force.* Section 9 (h) is designed to protect the public not against what Communists and others identified therein advocate or believe, but against what Congress has concluded *they have done* and are *likely* to do again." (339 U.S. at p. 396.) Emphasis ours except where indicated.) The petitioner argued, however, that the court must find a clear and

present danger to the security of the nation or of widespread industrial strife in order to sustain section 9(h). In answer to this contention, the court said, at page 397: [Since the *Schenck* case] this court has decided that *however* great the likelihood that a substantive evil will result, restrictions on speech and press cannot be sustained unless the evil itself is 'substantial' and 'relatively serious' (citation), or sometimes 'extremely serious.' (Citation.) . . . But in suggesting that the substantive evil must be serious and substantial, it was never the intention of this court to lay down an *absolutist test* measured in terms of danger to the Nation. When the *effect* of a statute or ordinance upon the exercise of First Amendment freedoms is *relatively small* and the *public interest to be protected is substantial,* it is obvious that a rigid test requiring a showing of *imminent danger* to the security of the Nation is an absurdity." (Emphasis added.) In considering recent cases involving application of the doctrine, the court said: "And recent cases in this court involving contempt by publication likewise have no meaning if *imminent danger of national peril* is the criterion." (339 U.S. at p. 398.) (Emphasis added.)

The present rule or "test" is enunciated in the Dennis case. The court recognized that the validity of the Smith Act depended upon the meaning of the phrase "clear and present danger." "Obviously, the words [clear and present danger] cannot mean that before the Government may act, it must wait until the putsch

is about to be executed, the plans have been laid and the signal is awaited. . . . Certainly an attempt to overthrow the Government by force even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The danger which such *attempts* create both physically and politically to a nation makes it impossible to measure the validity in terms of the *probability of success*, or the *immediacy of a successful attempt*." (341 U.S. at p. 509.) (Emphasis added.) Since "imminent" peril or "immediacy of a successful attempt" is not the proper criterion to apply, the court enunciated the real test, using the language of Judge Learned Hand in *United States v. Dennis*, 183 F.2d 201, at page 212: " 'In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' (Citation.) We adopt this statement as the rule." (341 U.S. at 510.)

We are therefore required to proceed to a determination of whether or not a "clear and present danger" exists against which the Legislature of this state has the right, duty and power to protect the citizens of this state, even though certain rights of free speech and assembly may be thereby impinged, and whether sections 16564 and 16565 of the Education Code accomplish this end in a legitimate manner. We must first determine the relative importance of the rights to be protected; on the one hand, the gravity of the evil

against which protection is sought, and on the other hand, the scope of the restrictions on speech and assembly which the present statute seeks to impose. If the danger is great and the restriction on constitutional freedom is slight, the probability of the occurrence of the substantive evil is not a substantial factor. This is the principle of the Douds case. However, if the restricted rights involve a large segment of the citizenry or seriously impair the rights of a few, we must apply the rule in the Dennis case; i.e., "the gravity of the 'evil,' discounted by its improbability." In no event are we required to find an "imminent" or impending peril in order to find the existence of a "clear and present danger." The *Danskin* court, on the other hand, applied the "imminency" test in reaching its decision for that was the rule in 1946, before the Douds case in 1949 and the Dennis case in 1950. For this further reason, the Danskin case is not controlling in the present controversy.

We have concluded that under the rule of either the Douds or Dennis cases, the statute in question protects against a "clear and present danger" and that infringements of free speech and assembly flowing from its application are therefore proper and do not render it unconstitutional. Applying the Douds rule to the challenged sections, the immediate question is: What evil is sought to be abated? The answer is simple. The Legislature, through this statute, seeks to protect the people of this state from the commission in public

school buildings of acts of subversion or acts intended to support subversive elements. An act of subversion is, in and of itself, an "evil" of a "substantive" or "grave" nature, and acts intended to support subversive elements are no less "evil." That the public school buildings of this state should be used as the spawning ground of violence and terrorism is repugnant to every ideal of freedom-loving people. It is the antithesis of the democratic principles which our public schools are designed to foster and perpetuate.

Conversely, the only rights of free speech and assembly which are denied by this statute are denied to those persons or groups which intend to use our school buildings for the proscribed acts and only incidentally for the promulgation of ideas. The controlling fact is that such subversive elements, especially the communists, have been found by the Legislature to have as their primary purpose, the violent overthrow of our form of government and the eventual subjugation of the people of this State and Nation to the will of the Kremlin. The grave danger that acts of subversion or acts calculated to support subversive elements will be committed by communists and others of like ilk, leads inescapably to the conclusion that they must be barrer from the use of school property in order to guarantee that the schools will not be used as a convenient "community center" of subversive activity.

Thus the total effect of the statute to bar the doors of our schools to those who would subvert our liberties,

The restriction is slight and the danger grave. Thus, under the Douds case, the clear and present danger test has been successfully met by this legislation.

We next consider the challengd statute in the light of the rule of "clear and present danger" laid down in the Dennis case. As the rule is paraphrased by our Supreme Court in *Katzev v. County of Los Angeles,* 52 Cal.2d 360, 366, we must determine "whether the gravity of any such 'evil' discounted by its improbability, 'justifies' invasion of freedom of speech in order to avoid the 'danger.' "

The substantive evil at which the statute is aimed is acts; acts of subversion or acts intended to further subversive interests, committed within public school buildings. That such acts constitute the highest order of threat to our free society is obvious. Moreover, the fact that an organization intends to commit such acts makes the likelihood of their occurrence a near certainty. Thus the test of the Dennis case is thoroughly satisfied; a grave evil which is almost certain to occur but for the prohibitions of the statute.

The provisions of the "Statement of Information" clearly implement the objectives of the statute within the constitutional limitations of the "clear and present danger" doctrine. If an organization intends to commit the proscribed acts, advocates the overthrow of the government or is required by law to be registered with the Attorney General of the United States, it is

highly probable that such organization *will* commit the proscribed acts. Petitioners argue, however, that the mere requirement of registration with the Attorney General is not sufficient to raise such a probability. The answer to this contention is found in the registration statute itself. (Internal Security Act of 1950, 64 Stat. 987, 50 U.S.C. §§ 781-798.) This statute requires the registration of all "communist-front" or "communist-action" organizations with the Attorney General of the United States. (50 U.S.C. §786.) A "communist-action" organization is defined as one "which is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement . . . and operates primarily to advance the objectives of such world Communist movement . . ." (50 U.S.C. §782.) A "communist-front" organization is one which (A) is substantially directed, dominated, or controlled by a Communist-action organization, and (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement. . . ." (50 U.S.C. §782.)

The objectives and practices of world Communism are disclosed and found as facts in 50 United States Code, section 781 and in The Communist Control Act of 1954, both quoted in part in the margin, *supra*, and by our own Legislature in section 1027.5 of the Government Code, also quoted *supra* in the margin. Thus by

definition, a "communist-front" or "communist-action" organization is dedicated to the future overthrow of our government and to the commission, at every opportunity, of acts intended to further such purpose. The relevant fact required to be disclosed by the "Statement of Information" is that the organization for which application is made is *not* a "communist-front" or "communist-action" organization required *by law* to be registered with the Attorney General of the United States. The applicant is only required to state, to the best of his knowledge and belief, that the organization does not fall within the definition of a "Communist-action" or "Communist-front" organization established by the Internal Security Act (50 U.S.C. § 782, *supra*). The fact that the organization is or is not so registered is immaterial. The only fact required to be stated is that the organization is not required *by law* to register, i.e., does not fall within the above definition.

Obviously, a "communist-front" or "communist-action" organization which falls into the above definition, constitutes a direct threat of affirmative, subversive action. It is clear that the Legislature, in referring to such organizations, considered that they constitute groups dedicated to the violent overthrow of the governments of the state and nation. No other meaning may be gleaned from the registration statute set out above. A foreign controlled, communist group which has as its object the violent overthrow of our government is per se, an organization likely to commit acts of

subversion or acts intended to further its own subversive interests or the interests of related subversive groups. Therefore, any applicant who cannot truthfully sign the "Statement of Information" presumably represents an organization which is likely to commit the proscribed *acts*, and it is immaterial whether he cannot truthfully swear to the entire "Statement" or only a part thereof. All of the required information is vital to an advance determination by the school board as to whether or not the *acts* will be committed, and the "Statement of Information" is not defective by reason of reference to groups which "advocate" the overthrow of the Government or to "communist-front" and "communist-action" organizations.

Additionally, petitioners urge three further grounds of unconstitutionality with respect to sections 16564 and 16565: (1) That the language of the sections is vague and uncertain; (2) that they conflict with Congressional enactments which occupy the field; and (3) that they violate due process.

As to (1) above, an examination of the challenged sections discloses certain key words and phrases, which, if their meaning is clear, add certainty to the requirements contained therein. In section 16564, the key phrase is "acts intended to further any program or movement the purpose of which" is the violent overthrow of the government. The questions are: (1) What is such an "act"; and (2) Is the meaning of the word "act" sufficiently definite?

We have previously construed the word "act" to mean any act of subversion (which obviously would be intended to further the interests of the subversive elements in our midst) or any act intended to further the interest of subversives. The statute means exactly what it says: *any act.* We are not required to enumerate the various acts which would fall into this classification for they range from fund raising, through recruiting and advocacy of immediate overthrow of the government, to the distribution of arms and ammunition. If the act furthers the purposes or is intended to further the purposes of subversives, it is proscribed, no matter how innocuous it might be if considered out of context with the major evil at which the statute is aimed. It should be here carefully noted that we are not passing on the definiteness or certainty of section 16564 insofar as that section constitutes a criminal sanction. The second paragraph makes the commission of the proscribed acts a misdemeanor but it is not before us on this petition, and we are thus not required to consider its constitutionality.

Thus the word "act" as found in section 16564 has a sufficiently definite meaning and a fortiori, a definite meaning as used in section 16565 in the "Statement of Information." In the latter section, the "Statement" requires that the applicant state "*to the best of his knowledge*": (1) That no "act" (as above defined) will be committed in the public school property; (2) that the organization which he represents does not ad-

vocate (as herein explained) the overthrow of the government by force; and (3) that it is not a communist-action or communist-front organization required to be registered with the Attorney General of the United States. The first requested information is in substantially the same language as section 16564 and is sufficiently definite. The second fact relates to advocacy, and, as we have said, advocacy has aquired a definite meaning, i.e., the inciting of others to immediate action or to action as soon as is practicable. The applicant is thus only required to state that the organization which he represents does not, to the best of his knowledge, advocate the violent overthrow of the government. This too, is clear. The third required fact relates to communist groups required to be registered with the Attorney General. The provisions requiring such registration are clearly set out in the Federal statute as we have previously pointed out. The applicant is only required to state, in effect, that, if any of the facts called for by the "Statement" apply to his organization or to the use which will be made of the school property, he does not know of such facts of his own knowledge. The meaning of the statute is sufficiently clear to provide a definite basis upon which the signing member or individual may evaluate the information at his disposal to the end that he may determine whether any of the facts called for apply to his situation.

The Supreme Court of the United States rejected the argument of vagueness in *Barenblatt v. United*

States, 360 U.S. 109. In that case, the petitioner's conviction for contempt of Congress was upheld. The petitioner had refused to answer questions regarding his Communist Party affiliations put to him by a subcommittee of the House Committee on Un-American Activities during the course of an inquiry concerning alleged Communist infiltration into the education field. The authority of the sub-committee was challenged on the ground that the investigative authority conferred on the subcommittee by Congress was vague and uncertain. The authority was granted by rule XI, paragraph 17 (b), H Res 5, 83 Cong, 1st sess. 99 Cong Rec. 15, 18, 24, which reads: The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of *un-American propaganda activities* in the United States, (2) the diffusion within the United States of subversive and *un-American propaganda* that is instigated from foreign countries or of a domestic origin and attacks the principle of the *form* of government as guaranteed by our Constitution, and (3) *all other questions* in relation to acts that would aid Congress in any necessary remedial legislation." (Emphasis added.)

It would be hard to imagine a more general authority or one more lacking in definite statements. Yet the Supreme Court held that it was sufficiently definite to allow the subcommittee to investigate communist ac-

tivities in education and, in particular, to question the petitioner (a teacher) about his own affiliations and to sustain a conviction for contempt for his failure to answer. The holding is based upon the long history of comparable investigative subcommittees and upon the rule that a legislative act need not be construed strictly and as it reads if it is accompanied by a "pervasive gloss of legislative history." Precisely the same point is involved in the present case. Too much legislative and judicial water has passed under the bridge for us to hold that any applicant who desired to make use of school buildings would not be fully aware of the meaning of the questions posed by the "Statement of Information." We have but given judicial life to the already established concepts with which the challenged statute deals. The statute, for the purposes here under consideration, is not, therefore, unconstitutional for vagueness or uncertainty. (See *American Communications Assn. v. Douds*, 339 U.S. 382, 413.)

The second contention of petitioners, viz., that the statute conflicts with federal legislation that occupies the field, is also without merit. They cite *Pennsylvania v. Nelson*, 350 U.S. 497, to support this contention, but this case is not in point. It dealt with the conflict between the Federal Smith Act (18 U.S.C. § 2385) and the Pennsylvania Sedition Act. Both statutes made knowing advocacy of the overthrow of the government by force or violence a crime. The United States Supreme Court ruled that Congress had occupied the field with the Smith Act and that the Pennsylvania

act was therefore in direct conflict with federal legislation and was unconstitutional. No parallel situation is involved here.

Furthermore, the Nelson case must be limited to its precise holding. As stated in *Uphaus v. Wyman*, 360 U.S. 72, at 76: The basis of *Nelson* thus *rejects* the notion that it stripped the States of the right to protect themselves. *All* the opinion proscribed was a race between federal and state prosecutors to the courthouse door . . . Nor did our opinion in *Nelson* hold that the Smith Act had proscribed state activity in protection of itself either from actual or threatened 'sabotage or attempted violence of all kinds.'" (Emphasis added.)

Initially it should be noted that the present statute does not purport to relate to any but *acts* committed within the public school buildings of this State. It is designed solely for the purpose of the regulation of the use of such buildings. No applicable federal legislation on this subject has ever been passed. Thus there is no apparent*direct* conflict with any federal statute and Congress has not occupied the field. The reference to "communist-front and communist-action organizations required by law to be registered with the Attorney General of the United States" is likewise not in conflict with federal legislation. The only purpose for the inclusion of this phrase is to impart to the school board the information it must have in order to determine in

advance whether or not proscribed acts will be committed. No further application of this information is intended or permitted by the statute. Thus, the fact, without more, that such registration is required by a federal statute is not enough to show any direct conflict. (*First Unitarian Church v. County of Los Angeles,* 48 Cal.2d 419, rev'd. on other grounds, 357 U.S. 545.

The last contention of petitioners referred to above is that the statute violates due process. In this connection petitioners argue that the "Statement of Information" shifts the burden of proof to the applicant by requiring him to protest his innocence before being allowed to exercise an otherwise available right to the use of school property; that is, that the statute assesses a penalty without due process of law, in that no proof of the unfitness of applicant by the board is required before he is forced to prove his own innocence. The penalty would, presumably, be the depriving of the applicant of the use of school property. Petitioners rely principally on *Speiser v. Randall,* 357 U.S. 513. The *Speiser* case concerned the constitutionality of a California statute, which implemented the provision in the California Constitution that a tax exemption be denied to all persons who advocate the unlawful overthrow of the government. The statute required that an applicant for a tax exemption sign a statement on his tax return that he does not advocate the unlawful overthrow of the government.

The court found this statute to be unconstitutional because it restricted the taxpayer's freedom of speech without the procedural safeguards required by the due process clause of the Fourteenth Amendment by placing the burden of proof and persuasion of nonengagement in the proscribed advocacy on the applicant. The court viewed the withholding of a tax exemption as a "penalty" (in the nature of a criminal sanction) on speech; i.e., speech advocating the overthrow of the government, which is proscribed as a criminal activity and, as such, held that the State must bear the burden of proving that the taxpayer had in fact engaged in such activity before denying the exemption. However, as we have pointed out, the statute involved in the present case has as its purpose the achievement of an objective other than restraint on speech. In this respect, the present statute is more like the statute in the Douds case than the tax exemption statute in the Speiser case. In the Douds case, the requirement of the oath by union officers that they did not advocate the overthrow of the government was upheld *even though the initial burden of proof was upon them.* The *Speiser* court expressly recognized the essential distinction which also applies here; that is, where free speech is only incidentally restricted by a statute, and where the real objective is something other than such restriction, the burden of going forward with the proof of non-advocacy may constitutionally be placed (initially) on the individual. In distinguishing the Douds

case, the *Speiser* court held: "While the [Douds] court recognized that the necessary effect of the legislation was to discourage the exercise of rights protected by the First Amendment, this consequence was said to be only indirect. The Congressional purpose was to *achieve an objective other than restraint on speech.* Only the *method of achieving this end* touched on protected rights and that only tangentially." (359 U.S. 513, 527.) (Emphasis added.)

Thus, the Speiser case is not here controlling. No restraint on speech or assembly, as such, is sought by the statute in question. The real objective is the protection of our public schools from the commission of subversive acts therein. Only "tangentially" does the statute restrict speech and assembly. There is, therefore, no violation of due process in the application of the challenged statute as it now stands.

We have decided that sections 16564 and 16565 of the Educational Code are constitutional and that petitioners herein are required to submit the "Statement of Information" to the school board before that agency may permit them to make use of public school facilities. In arriving at this conclusion we have not been unmindful of the great importance which all courts must attach to First Amendment rights. We fully agree that the courts must zealously protect the personal right of free speech for we believe that "free discussion contains the germ of progress which keeps flowing the blood stream of the Republic." (*In re Lygous*, 27 Cal.App.2d

293, 296.) And when the state undertakes to restrain unlawful acts, where, in so doing, it also restricts in some degree free speech and assembly, "only considerations of the greatest urgency can justify [the] restrictions." *Speiser v. Randall, supra,* p. 521.) But the validity of the restraint on speech and assembly in each case depends upon a careful analysis of the particular circumstances. (*Dennis v. United States, supra.*)

Courts may not blind themselves to reality nor are they justified in shrinking from shadows. In this case we are faced with the stark reality of active subversive elements operating at our very doorstep; working diligently and tirelessly in fanatic devotion to the dictates of our enemies. Through our Legislature, the people of our state have declared and ordained that these selfsame subversives shall not have access to the public school buildings of the state for the commission of acts of subversion. If this is not a just and proper exercise of free government, then we are indeed helpless as a state and as a nation. We cannot and shall not brand this legislative mandate as "unconstitutional." To do so might appease those among us who still believe that terrorists and revolutionaries should be allowed free rein in the public domain until such time as the first shot is fired, but this myopic idealism can lead only to ultimate disaster. We believe, with the court in *Dennis,* that: "overthrow of the government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ulti-

mate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected." (341 U.S. at 509.) Thus, viewing this mild legislation by which the Legislature has attempted, by the only means at its disposal, to protect our public schools from use of subversives or their fellow-travelers for the commission of acts of subversion or acts supporting subversion, we must conclude that, if the state cannot go at least this far in protecting its own interests, it is powerless to act in any effective manner. This legislation is a proper and necessary exercise of the Legislature's power in the fight against those who would destroy for all time those great principles which inure to us through our federal and state Constitutions.

The further point raised by petitioners concerning the discretionary 30-day application requirement of the respondent board may not be here considered since the petitioners have heretofore failed to perfect their applications by filing the required "Statement of Information."

The alternative writ is discharged, and the petition is denied.

Ashburn, J., and Kincaid, J. pro tem.;* concurred.

*Assigned by Chairman of Judicial Council.

[Civ. No. 24574. Second Dist., Div. Two. May 24, 1960.]

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA (a Corporation) et al., Petitioners, v. BOARD OF EDUCATION OF THE CITY OF SAN DIEGO, Respondent.

PROCEEDING in mandamus to compel the Board of Education of the City of San Diego to grant petitioners the use of certain school buildings in which to hold public meetings. Writ denied.

A. L. Wirin, Abraham Gorenfeld, Irwin Gostin for Petitioners.

Henry A. Dietz, County Counsel (San Diego), Donald L. Clark and Joseph Kase, Jr., Deputy Attorney, for Respondent.

FOX, P. J.—Petitioners seek a writ of mandate to compel the respondent board of education to grant them the use of certain school buildings in the city of San Diego, in which to hold a series of monthly public meetings.

The issues presented by this petition are identical in all material respects with those presented in *American Civil Liberties Union v. Board of Education of the City of Los Angeles* (No. 24573, *ante*, [1]p. —— [——

Cal.Rptr. ——], decided this day. For the reasons expressed in the above opinion, the alternative writ is discharged and the petition is denied.

Ashburn, J., and Kincaid, J. pro tem.* concurred.

*Assigned by Chairman of Judicial Council.

APPENDIX "D"

United States Constitution, First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Fourteenth Amendment in pertinent part provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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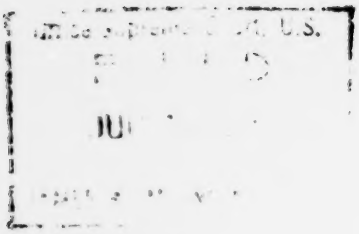

IN THE

Supreme Court of the United States

October Term, 1961
No. 1...2...

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,
Petitioner

vs.

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, et al.,

BOARD OF EDUCATION OF THE CITY OF SAN DIEGO,
Petitioner,

vs.

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, et al.,

On Petition for Writs of Certiorari to the Supreme Court of the State of California.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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IN THE

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BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,
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vs.

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BOARD OF EDUCATION OF THE CITY OF SAN DIEGO,
Petitioner

vs.

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, et al.,

On Petition for Writs of Certiorari to the Supreme Court of the State of California.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinions Below.

The opinions of the California Supreme Court are reported in 55 Adv. Cal. 170 and 55 Adv. Cal. 190 (Petitioners Appendix "A" and "B").

Jurisdiction.

The judgments of the Supreme Court of California were entered on January 24, 1961; a Petition For Rehearing was denied by the California Supreme Court on February 21, 1961. The Petitions for Writs of Certiorari were filed on May 22, 1961. The jurisdiction of this Court is invoked under 28 U. S. Code Section 1257(3).

Questions Involved.

1. Whether there is presently a justiciable controversy between the Petitioner Board of Education of the City of Los Angeles and the Respondent.

2. Whether the judgment of the Supreme Court of California rests on an adequate non-federal ground.

Statutes Involved.

California Education Code Section 10550 provides:

> "Creation of civic centers and authorization of use of other properties. There is a civic center of each and every public school building and grounds within the State where the citizens, parent-teachers' associations formed for recreational, educational, political, economic, artistic, or moral activities of the public school districts may engage in supervised recreational activities, and where they may meet and discuss, from time to time, as they may desire, any subjects and questions which in their judgment appertain to the educational, political, economic, artistic, and moral interests of the

citizens of the communities in which they reside. Governing boards of the school districts may authorize the use, by such citizens and organizations of any other properties under their control, for supervised recreational activities. (Stats. 1959, c. 2, p. 1110, §16556.)"

Section 16557 provides:

"Use subject to rules and regulations; interference with use for school purposes. The use of any public schoolhouse and grounds for any meeting is subject to such reasonable rules and regulations as the governing board of the district prescribes and shall in nowise interfere with the use and occupancy of the public schoolhouse and grounds, as is required for the purposes of the public schools of the State. (Stats. 1959, c. 2, p. 1111, §16557.)"

Section 16564 provides:

"Use to further program for overthrow of the government by force a misdemeanor. Any use, by any individual, society, group, organization for the commission of any act intended to further any program or movement the purpose of which is to accomplish the overthrow of the Government of the United States or of the State by force, violence, or other unlawful means shall not be permitted or suffered.

Any individual, society, group, or organization which commits any act intended to further any program or movement the purpose of which is to

accomplish the overthrow of the government by force, violence or other unlawful means while using school property pursuant to the provisions of this chapter (commencing at Section 16551), is guilty of a misdemeanor. (Stats. 1959, c. 2, p. 1112, §16564.)"

Section 16565 in relevant part provides:

"Determination of intention; form of information and discretion of board. No governing board of a school district shall grant the use of any school property to any person or organization for any use in violation of Section 16564.

For the purpose of determination by such governing board whether or not any individual, society, group or organization applying for the use of such school property intends to violate Section 1656, the governing board shall require the making and delivery to such governing board, by such applicant of a written statement of information in the following form:

STATEMENT OF INFORMATION

The undersigned states that, to the best of his knowledge, the school property for use of which application is hereby made will not be used for the commission of any act intended to further any program or movement the purpose of which is to accomplish the overthrow of the Government of the United States by force, violence of other unlawful means;

That . . ., the organization on whose behalf he is making application for use of school property, does not, to the best of his knowledge, advocate the overthrow of the Government of the United States or of the State of California by force, violence, or other unlawful means, and that, to the best of his knowledge, it is not a communist-action organization or communist-front organization required by law to be registered with the Attorney General of the United States. This statement is made under the penalties of perjury.

.....

(Signature)

"The school board may require the furnishing of such additional information as it deems necessary to make the determination that the use of school property for which application is made could not violate Section 16564 of the Education Code."

ARGUMENT.

I.

No Justiciable Controversy Between One Petitioner and the Respondent.

There is presently no justiciable controversy between the Petitioner, Board of Education of the City of Los Angeles, Respondent, with respect to the oath requirement adjudicated by the California Courts.

Subsequent to the decision of the California Supreme Court herein, and on April 6, 1961, that Petitioner adopted a new regulation, imposing an oath requirement *different* from the one passed upon by the California Courts; hence, there is no warrant for this Court to review the matter, since that Petitioner is not now enforcing, the oath at issue in the courts of California.

The text of this new and different declaration is set forth in Appendix "A", annexed to this Brief.

Cf.:

Pauling v. McElroy, 364 U. S. 835; also
Pauling v. Eastland, 364 U. S. 900.

II.

The Judgment of the Supreme Court of California Rests Upon an Adequate Non-Federal Ground.

The decision is posited upon the provisions of the Constitution of California,[1] and upon an earlier ruling by that Court; hence the judgment below is encased in adequate non-federal pillars, stout enough to uphold the judgment, independent of any federal support.

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[1]The text of these provisions is set forth in the Petition, page 8, footnote.

The Petitions for Writ of Mandate, filed in the California Courts by the Respondent here, challenged the oath requirement on both federal and state grounds—namely, that it violated the California Constitution, as well as the Constitution of the United States.

The California Supreme Court thus stated the position of the Respondent:

(Appendix to Petition for Writ of Certiorari, p. 3):

> "Petitioners refused to furnish the prescribed statement primarily on the ground that such test oath requirement abridged both the state and federal constitutional guarantees of freedom of speech and assembly. (U. S. Const., Amendments I and XIV; Cal. Const. art. I, §§9, 10.)"

After the decision of the California Supreme Court, in a Petition for Rehearing (p. 3) filed in that Court,[2] by the Petitioners here, they urged the following:

> "THE OPINION SHOULD BE MODIFIED TO INDICATE WHETHER THE STATUTE INVOLVED IS UNCONSTITUTIONAL BECAUSE IT CONFLICTS WITH THE STATE CONSTITUTION OR BECAUSE IT CONFLICTS WITH THE UNITED STATES CONSTITUTION.
>
> "The Court has held a statute enacted by the legislature unconstitutional. It is a matter of great concern to petitioners herein whether the court holds the legislative enactment invaiid because of conflict with the California Constitution.

---

[2]Copies of all pleadings and briefs before the Supreme Court of California have been filed by the Petitioners with the Clerk of this Court.